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In The

Supreme Court of the United States

October Term, 1992

JACK F. KEMP, SECRETARY OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, et al.,

Petitioners,

v.

ALPINE RIDGE GROUP, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF STATESMAN SAVINGS HOLDING CORP., THE STATESMAN GROUP, INC., AMERICAN LIFE AND CASUALTY INSURANCE COMPANY, MCB FINANCIAL GROUP, INC., MEADOWS RESOURCES, INC., REPUBLIC HOLDING COMPANY, NORTHEAST SAVINGS, F.A., COAST FEDERAL BANK, FEDERAL SAVINGS BANK, CITIZENS FEDERAL BANK, A FEDERAL SAVINGS BANK, CSF HOLDINGS, INC., HOME SAVINGS OF AMERICA, FSB, and H.F. AHMANSON & COMPANY, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. GOVERNMENT PROMISES SUPPORTED BY CONSIDERATION BECOME VESTED RIGHTS WHEN THE GOVERNMENT RECEIVES THAT CONSIDERATION 6

II. NO PRINCIPLE OF LAW EXCUSES THE GOVERNMENT'S REPUDIATION OF ITS CONTRACTUAL COMMITMENTS 16

A. The Law Creates No Higher Standard For Contracts With The Government To Be Binding 16

B. The Circumstances Underlying The Government's Breach Do Not Excuse It From Liability 20

C. Whatever The Government's Ability To Avoid Having To Specifically Perform Its Contractual Commitments, It May Not Breach Such Commitments Without Incurring Liability 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Allied Structural Steel v. Spannaus, 438 U.S. 234 (1978) 23

Armstrong v. United States, 364 U.S. 40 (1960)..... 28

Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986) ..... *passim*

Brooks-Scanlon Corp. v. United States, 265 U.S. 106 (1924) 10

Butler v. Pennsylvania, 51 U.S. (10 How.) 402 (1850) 10

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)..... 16

Choate v. Trapp, 224 U.S. 665 (1912) 8, 9

Clark v. United States, 95 U.S. 539 (1877) 29

De La Rama S.S. Co. v. United States, 344 U.S. 386 (1953) 12

De Laval Steam Turbine Co. v. United States, 284 U.S. 61 (1931)..... 10

Federal Housing Admin. v. The Darlington, 358 U.S. 84 (1958).....14, 15

First English Evangelical Lutheran Church v. Los Angeles, 482 U.S. 304 (1987)..... 28

Fisk v. Jefferson Police Jury, 116 U.S. 131 (1885)..... 10

TABLE OF AUTHORITIES – Continued

Page

Flemming v. Nestor, 363 U.S. 603 (1960)..... 7

Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) 10

Grove City College v. Bell, 465 U.S. 555 (1984)..... 26

Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146 (1919)..... 22

Hipolite Egg Co. v. United States, 220 U.S. 45 (1911) 22

Hodel v. Irving, 481 U.S. 704 (1987)..... 13, 20, 21

Indiana ex rel. Anderson v. Brand, 303 U.S. 95 (1938) 10

Kaiser Aetna v. United States, 444 U.S. 164 (1979)..... 13

Larionoff v. United States, 533 F.2d 1167 (D.C. Cir. 1976), *aff'd*, 431 U.S. 864 (1977) ..... *passim*

Lincoln Federal Labor Union v. Northwestern Iron and Metal Co., 335 U.S. 525 (1949)..... 23

Lottery Case, 188 U.S. 321 (1903) 22

Lynch v. United States, 292 U.S. 571 (1934)..... *passim*

Maxima Corp. v. United States, 847 F.2d 1549 (Fed. Cir. 1988) 10

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) .17, 18

Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893)..... 22

TABLE OF AUTHORITIES – Continued

Page

Murray v. Charleston, 96 U.S. 432 (1878) 18, 19

National Fuel Gas Supply Corp. v. FERC, 811 F.2d 1563 (D.C. Cir.), *cert. denied*, 484 U.S. 869 (1987) 17

New Jersey v. Yard, 95 U.S. 104 (1877) 10

New York Central & Hudson River R.R. v. Gray, 239 U.S. 583 (1916) 29

New York Mail & Newspaper Transp. Co. v. United States, 154 F. Supp. 271 (Ct. Cl.), *cert. denied*, 355 U.S. 904 (1957) 29

Norman v. Baltimore & O.R. Co., 294 U.S. 240 (1935) ..7, 25

Ocean Technology, Inc. v. United States, 19 Cl. Ct. 288 (1990) 29

Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981) 26, 27

Pension Benefit Guaranty Corp. v. Gray, 467 U.S. 717 (1984) 7

Perry v. United States, 294 U.S. 330 (1935) ..... *passim*

Prestex, Inc. v. United States, 320 F.2d 367 (Ct. Cl. 1963) 29

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) ..... *passim*

Santobello v. New York, 404 U.S. 257 (1971) 20

TABLE OF AUTHORITIES – Continued

Page

Sinking Fund Cases, 99 U.S. 700 (1879) 8, 16, 20

Transohio Sav. Bank v. Director, Office of Thrift Supervision, 967 F.2d 598 (D.C. Cir. 1992) 17

United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980) 7

United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) ..... *passim*

United States v. Amdahl Corp., 786 F.2d 387 (Fed. Cir. 1986) 29

United States v. Larionoff, 431 U.S. 864 (1977) 12, 13

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) 7

Winstar Corp. v. United States, 25 Cl. Ct. 541 (1992), *appeal pending*, No. 92-5164 (Fed. Cir. 1992) 6, 28

Wood v. Lovett, 313 U.S. 362 (1941) 10

Yosemite Park & Curry Co. v. United States, 582 F.2d 552 (Ct. Cl. 1978) 29

OTHER AUTHORITIES

3 Joseph Story, *Commentaries on the Constitution* (1833) 8, 19, 29

B. Wright, *The Contract Clause Of The Constitution* (1938) 23

G. Gunther, *Constitutional Law* (1974) 23

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INTEREST OF THE *AMICI CURIAE*

Amici are savings banks or the owners of savings banks whose contracts with the United States were breached – as were those of respondents in this case – when Congress enacted legislation that abrogated key

terms of those contracts. *Amici* have each sued the United States seeking, *inter alia*, money damages for breach of contract and for the uncompensated taking and deprivation of property in violation of the Fifth Amendment.

Statesman Savings Holding Corp., The Statesman Group, Inc., and American Life and Casualty Insurance Company are plaintiffs in the suit styled *Statesman Savings Holding Corp. v. United States*, No. 90-773C (Fed. Cl. filed Aug. 15, 1990). The United States Court of Federal Claims entered partial summary judgment as to liability in favor of plaintiffs on July 24, 1992. *Statesman Savings Holding Corp. v. United States*, 26 Cl. Ct. 904 (1992). The case was certified and consolidated for appeal with two other related cases,[1] and that appeal is currently pending in the United States Court of Appeals for the Federal Circuit. *Winstar Corp. v. United States*, No. 92-5164 (Fed. Cir.). The suits of the other *amici* are in the discovery phase in the Court of Federal Claims and no trial dates have been set.[2]

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[1] The two related cases are *Glendale Federal Bank, FSB v. United States*, No. 90-772C (Fed. Cl. filed Aug. 15, 1990) and *Winstar Corp. v. United States*, No. 90-8C (Fed. Cl. filed Jan. 2, 1990).

[2] *Citizens Federal Bank v. United States*, No. 92-656C (Fed. Cl. filed Sept. 22, 1992) (Citizens Federal Bank, A Federal Savings Bank and CSF Holdings, Inc.); *Home Savings of America, FSB v. United States*, No. 92-620C (Fed. Cl. filed Sept. 4, 1992) (Home Savings of America, FSB and H.F. Ahmanson & Company); *Northeast Savings, F.A. v. United States*, No. 92-550C (Fed. Cl. filed Aug. 12, 1992) (Northeast Savings, F.A.); *Coast Federal Bank v. United States*, No. 92-466C (Fed. Cl. filed July 9, 1992) (Coast Federal Bank); *Republic Savings Bank, F.S.B. v. United States*, No. 92-265C (Fed. Cl. filed April 13, 1992) (MCB Financial Group, Inc., Meadows Resources, Inc., and Republic Holding Company).

The contracts to which *amici* are parties, and the legislation by which petitioners repudiated their obligations under those contracts, are not related to the contracts or legislation involved here. Consequently, this case raises questions of statutory and contract construction unrelated to the controversies in which *amici* are involved. Nevertheless, in both this case and those in which *amici* are involved, the government has attempted to avoid any liability for its repudiation of its contractual obligations on the ground that the sovereign can change or repudiate its contracts as it sees fit unless it has surrendered that power unmistakably. By "unmistakable surrender" the government does not simply mean a clear and express promise, bargained for at arm's length and supported by consideration, to undertake some act; rather, the government would require the contract to contain an additional, explicit promise not to repudiate that first promise at some point in the future.

Far from reflecting some well-established "modern view of congressional authority" as petitioners imply, Brief for the Petitioners ("Pet. Br.") at 33 n.31, petitioners' radical proposition is fundamentally at odds with the precedents of this Court. Petitioners seek to establish a power to avoid their contractual obligations with total impunity, a power that is effectively unlimited, or is limited only by contract language that has never appeared in any government contract, anywhere, at anytime.

Accordingly, *amici* have a strong interest in any ruling on this argument that the Court concludes to be necessary to the resolution of this case. Moreover, having joined issue with the government on this notion in a

variety of courts, *amici* are in a unique position to aid the Court in its consideration of the issue.[3]

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents contend, and the courts below found, that pursuant to the provisions of a federal statute and the express terms of written contracts, respondents and the Department of Housing and Urban Development ("HUD") entered into a binding contract governing how rent increases in certain low-income housing projects were to be calculated. Petitioners claim that this conclusion is based on an erroneous understanding of that statute and those contracts. *Amici* are not involved in that housing program and so are not in a position to contribute to those particular arguments in a manner helpful to the Court.

However, should petitioners be unable to bring this Court to their view of the statute and contracts, they advance several other arguments to avoid *any* liability for their breach of their promises, notwithstanding the contractual character of those promises under the law. The government's sovereign rights, according to petitioners, allow the government to enter an express, arm's length contract with a private party, receive the benefits of that party's performance, disavow its own promised performance at its pleasure, retain the benefits it has bargained for and received, and yet be insulated from any liability for its breach. This is so, according to petitioners, (1) because the "modern view" of government authority broadly "recognizes the prospective power of Congress to modify the government's contracts," Pet. Br. at 33 n.31, or

[3] Copies of the letters of the parties indicating consent to the filing of this brief are being filed with this brief.

(2) because a contract needs to expressly "surrender" Congress' sovereign power – in addition to any express promises of performance by the government – before a private contractor can truly rely on a contract promise made by the government, *id.* at 32, or (3) because " 'supervening conditions' implicating the police power" allow the government to breach its contracts with impunity, *id.* at 41-43, or, finally, (4) because the government is always free to breach its contracts so long as its does not do so simply to save money. *Id.* at 42-45.

Far from being "modern," all these arguments ultimately spring from an Old World understanding of the relationship of the sovereign to the citizen, an Old World understanding long abandoned by the American experiment and completely alien to our constitutional order. It is an elementary point of our law that "the Federal Government, as sovereign, has the power to enter contracts that confer vested rights, and the concomitant duty to honor those rights." *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986) ("*POSSE*"). If the rule petitioners urge here is to become our law, no citizen could ever enter into an arm's length bargain with the federal government that conveys real benefits to the government while exacting real obligations from it. Contrary to petitioners' proffered rule, this Court has consistently taught that both the Due Process and the Taking Clauses of the Fifth Amendment ensure that government contracts are not "vain promise[s] . . . having no other sanction than the pleasure and convenience of the pledgor." *Perry v. United States*, 294 U.S. 330, 351 (1935). Even when government performance of a contract is impossible because it would do serious harm to the public's health or safety, no precedent of the Court has held, on that account, that the original obligation was not truly contractual or that the government was

not obliged to compensate the innocent party for any injury caused by the breach.

The profound hostility of petitioners' proposition to our most basic constitutional premises was brought into sharp relief by an observation of the Court of Federal Claims in a recent opinion rejecting the very arguments the government presses here:

> The assertion that, in order to freely regulate, the government must have the power to disregard the rights and interests of its citizens is a novel proposition that finds no support . . . in our constitutional tradition. Sovereign power is always restricted, in one sense, by the rights of individuals. However, in our Nation that has never been seen as an improper restriction on regulatory power. Rather, it is the foundation upon which all law and regulation are built.

Winstar Corp. v. United States, 25 Cl. Ct. 541, 548 (1992), *appeal pending*, No. 92-5164 (Fed. Cir. 1992).

ARGUMENT

I. GOVERNMENT PROMISES SUPPORTED BY CONSIDERATION BECOME VESTED RIGHTS WHEN THE GOVERNMENT RECEIVES THE CONSIDERATION

Throughout their argument, petitioners ignore a fundamental distinction under the law between gratuitous government promises and government promises made to secure a private party's contractual performance or detrimental reliance. To be sure, given the scope of modern government regulation, the government must retain the flexibility to revise public policy in the light of experience and to address issues of public importance in a manner different from – even at odds with – that chosen in the

past. And indeed, the Constitution does not require the government to adhere to a policy if it has received nothing in exchange for it, such as gratuitous promises to provide benefits to, or to refrain from regulating, certain persons or groups.[4]

For similar reasons, the government, unless its action is unusually harsh or arbitrary, is free to readjust, even retroactively, the burdens and benefits of agreements solely between private parties. By definition, these purely private arrangements confer no benefit on the government, and the contracting parties, particularly in a heavily regulated industry, rarely have any legitimate reason, much less a vested right, to expect that the law at the time of contracting will remain unchanged in perpetuity. *Pension Benefit Guaranty Corp. v. Gray*, 467 U.S. 717 (1984); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 175 (1980); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). Consequently, the government's interference with private contracts is given much more deferential review than the government's impairment of its own commitments.[5]

However, petitioners are wholly mistaken when they imply that some "modern view of congressional authority" holds that the federal government is somehow entitled to repudiate its *own* obligations under a contract to

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[4] *See, e.g., POSSE*, 477 U.S. at 52 ("The termination clause was not unique to this Agreement; nor was it a term over which the State had any bargaining power or for which the State provided independent consideration."); *Flemming v. Nestor*, 363 U.S. 603 (1960) (Social Security benefits are not annuity contracts, and thus are gratuities unenforceable against the federal government.).

[5] *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 n.25 (1976). *Compare Perry*, 294 U.S. at 350-51 *with Norman v. Baltimore & O.R. Co.*, 294 U.S. 240, 304-305 (1935).

which it is a party. In those circumstances, the private party's contractual right to receive the bargained-for performance of the federal government is a property right that the government cannot, under both the Due Process and the Taking Clauses of the Fifth Amendment, unilaterally extinguish through repudiation. As this Court has recognized, "[t]he United States are as much bound by their contracts as are individuals." *Sinking Fund Cases*, 99 U.S. 700, 719 (1879).[6] In a long and unbroken line of cases, this Court and other courts have consistently held that when the government enters into a contract for the purpose of securing some specified performance from a private party, and that party fully performs its obligations under the contract, the private party's contractual right to receive the bargained-for performance of the government is a property right that the government cannot, consistent with the Fifth Amendment, unilaterally extinguish without compensation.

For example, in *Choate v. Trapp*, 224 U.S. 665 (1912), the Court upheld a lower court's decision enjoining enforcement of a statute purporting to tax Indian land that the federal government had pledged, both in written agreements and in a federal statute, would remain

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[6] *See also Perry*, 294 U.S. at 352 ("When the United States, with constitutional authority, makes contracts, it . . . incurs responsibilities similar to those of individuals who are parties to such instruments."); *Lynch v. United States*, 292 U.S. 571, 579 (1934) ("When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."); 3 Joseph Story, *Commentaries on the Constitution* § 1385 (1833) ("[T]he legislature may make a contract with individuals directly by a law, pledging the state to a performance of it; and then, when it is accepted, it is equally under the protection of the Constitution.").

exempt from taxation for a certain period of time. In exchange for the pledge of tax exemption, the Indians had relinquished all equitable claims to common tribal property, by which the Court found the plaintiff Indians had "furnished a consideration which was sufficient to entitle them to enforce whatever rights were conferred . . . . " *Id.* at 672. The statutory pledge of tax-exempt status, therefore, "was a property right, which Congress undoubtedly had the power to grant." *Id.* at 673. Accordingly, "[u]nder the provisions of the 5th Amendment there was no more power to deprive [the Indians] of the exemption than of any other right in the property." *Id.* at 674.

The *Choate* Court distinguished prior decisions in which the government was allowed to repeal "general statutes containing, not a grant, but an offer of [tax] exemption" to companies that agreed to build certain projects and that "actually built in reliance on [the statute's] terms":

> The companies gave nothing, and the state received nothing in exchange for the offer. There was no consideration moving from one to the other. Such exemption was a mere bounty, valuable as long as the state chose to concede it, but as tax exemptions are strictly construed, it could be withdrawn at any time the state saw fit.

Id. at 674-75.

The distinction recognized in *Choate*, and applied by the Ninth Circuit below – that generally applicable statutory gratuities are normally revocable at will, while bargained-for commitments made in discrete agreements create constitutionally protected property rights – has been followed consistently by this Court in a variety of

other contexts.[7] In *Lynch*, 292 U.S. at 576, for example, the Court concluded that yearly renewable term insurance policies issued by the Federal Bureau of War Risk Insurance were "contracts of the United States" that could not be abrogated by Congress. In a unanimous opinion authored by Justice Brandeis, the Court enforced the insurance policies. Citing both the Due Process and the

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[7] *See also Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) ("[v]alid contracts are property within meaning of the Taking Clause."); *United States Trust Co.*, 431 U.S. at 17 ("[T]he Contract Clause limits the power of the States to modify their own contracts."); *Wood v. Lovett*, 313 U.S. 362 (1941); *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938) ("[A] legislative enactment may contain provisions which, when accepted as the basis of action, become contracts between [individuals] and the State" protected by Contract Clause.); *De Laval Steam Turbine Co. v. United States*, 284 U.S. 61, 71 (1931) ("[C]ancellation [of a contract] is an exercise of the power of eminent domain, and the liability of the government is for just compensation."); *Brooks-Scanlon Corp. v. United States*, 265 U.S. 106, 121-22 (1924); *Fisk v. Jefferson Police Jury*, 116 U.S. 131, 134 (1885) ("[A]fter the services have been rendered under a law, . . . there arises an implied contract to pay for the services."); *New Jersey v. Yard*, 95 U.S. 104 (1877); *Butler v. Pennsylvania*, 51 U.S. (10 How.) 402, 416 (1850) ("[T]he promised compensation for services actually performed and accepted . . . may undoubtedly be claimed both upon principles of compact and of equity."); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) ("When . . . a law is in its nature a contract, when absolute rights have vested under that contract; . . . repeal of the law cannot divest those rights."); *Maxima Corp. v. United States*, 847 F.2d 1549, 1557 n.6 (Fed. Cir. 1988) ("[T]hat the government can always change the bargain . . . is anathema not only to the rule of law but to . . . principles of a great commercial nation."); *Larionoff v. United States*, 533 F.2d 1167, 1189 (D.C. Cir. 1976), *aff'd*, 431 U.S. 864 (1977) ("[O]nce someone agrees to perform . . . in exchange for a . . . sum of money, and the Government has received that performance . . . the 'gratuity' becomes a contractual right.") (footnotes omitted).

Taking Clauses, the Court grounded its analysis on the proposition that "[r]ights against the United States arising out of a contract with it are protected by the Fifth Amendment." *Id.* at 579. The Court found consideration for the contractual obligation in the payment of prescribed monthly premiums. *Id.* at 576. The Court stated that "[a]s Congress had the power to authorize the Bureau of War Risk Insurance to issue [the policies], the due process clause prohibits the United States from annulling them . . . . " *Id.* at 579.

Notably, the *Lynch* Court rejected the argument that the insurance policy contracts were unenforceable "gratuities," such as pensions or hospital privileges, on the ground that, notwithstanding their "benevolent purpose," they were contracts supported by consideration and thus created vested property rights protected by the Fifth Amendment. *Id.* at 576-77.

Similarly, the Court held in *Perry* that Congress' invalidation of gold standard clauses in bonds issued by the United States "went beyond the congressional power." 294 U.S. at 354. The Court dismissed the decisions allowing the United States to impair *private* contracts with identical "gold clauses" as inapposite:

> There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority and the power of the Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers.

Id. at 350-51.

The *Perry* Court also firmly rejected the argument that "when, with adequate authority, the government borrows money and pledges the credit of the United States, it is free to ignore that pledge and alter the terms of its obligations in case a later Congress finds their

fulfillment inconvenient." *Id.* at 350. The Court refused to "sanction . . . such a conception of the obligations of our government." *Id.* at 351.[8]

The circuit courts have also had occasion to consider a claim by the federal government that it need not honor its contractual commitment to private parties who have fully performed their end of the bargain. For example, in *Larionoff v. United States*, 533 F.2d 1167 (D.C. Cir. 1976), *aff'd*, 431 U.S. 864 (1977), the D.C. Circuit held that a statute preventing payment of reenlistment bonuses promised in Navy reenlistment agreements violated the Due Process Clause. Relying on *Lynch* and *Perry*, the court ruled that "[s]ince contractual rights against the government are property interests protected by the Fifth Amendment, Congressional power to abrogate existing government contracts is narrowly circumscribed." *Id.* at 1179. The court contrasted government "gratuities," subject to congressional repudiation, with the much different situation in which "someone agrees to perform certain services in exchange for a given sum of money, and the Government has received that performance . . . . " *Id.* at 1189. In such a case, "the 'gratuity' becomes a contractual right." *Id.*

This Court affirmed the D.C. Circuit's decision, albeit on slightly different grounds. The Court fully agreed that if Congress had intended to repeal the reenlistment bonuses extant at the time of the extension agreements, "serious constitutional questions would be presented." *United States v. Larionoff*, 431 U.S. 864, 879 (1977). The Court accepted the United States' argument that "Congress may prospectively reduce the pay of members of

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[8] *See also De La Rama S.S. Co. v. United States*, 344 U.S. 386, 388 (1953) ("[T]he Constitution precludes extinction of the Government's liability" under a war risk insurance policy.) (relying on *Lynch*).

the Armed Forces, even if that reduction deprived members of benefits they had expected to be able to earn." *Id.* Relying on *Lynch* and *Perry*, the Court concluded that "[i]t is quite a different matter, however, for Congress to deprive a service member of pay due for *services already performed, but still owing.*" *Id.* (emphasis added). The Court did not reach this constitutional question, however, because it interpreted the subsequent congressional act as not affecting the right to reenlistment bonuses.

Even where traditional contract documents are not involved, the Court has recognized that a private party's expectations in some course of government conduct may legitimately rise to the level of a protected property interest. *Monsanto*, for example, involved a 1972 federal statute providing that trade secrets submitted to the Environmental Protection Agency in connection with registering pesticides would not be disclosed publicly or considered in connection with a rival company's pesticide application. In 1978 the statute was amended to remove a certain class of trade secrets from those disclosure protections. The Court unanimously held that a chemical company was entitled to compensation under the Taking Clause for any damage caused by disclosure of its trade secrets submitted during the 1972-1978 period because "the Federal Government had explicitly guaranteed . . . an extensive measure of confidentiality and exclusive use [for the trade secrets submitted]. This explicit governmental guarantee formed the basis of a reasonable investment-backed expectation." 467 U.S. at 1011.[9]

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[9] *See also Hodel v. Irving*, 481 U.S. 704, 715-11 (1987) (invalidating congressional attempt to extinguish property interest created by earlier statute even though only consideration given to Congress in return was that property owners' "ancestors . . . ced[ed] to the United States large parts of the original Great Sioux Reservation."); *Kaiser Aetna v. United States*,

Thus, as the Ninth Circuit noted below, though the government assumes no obligation by virtue of a *gratuitous* promise unsecured by any consideration (or detrimental reliance) from the beneficiary, when it bargains for and receives valuable consideration for an express promise, particularly one contained in a bilateral contract, it may not then repudiate that promise, and keep the benefit received or otherwise escape liability for the breach.

In their effort to ignore the force of the cases discussed above, and the principle that Congress cannot impair vested contract rights, petitioners intently ignore the distinction between vested contract rights and gratuitous statutory provisions. For example, petitioners quote *Federal Housing Admin. v. The Darlington*, 358 U.S. 84, 91 (1958) for the general proposition that "[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." Pet. Br. at 32-33. Yet petitioners overlook the fact that the Court found that no contract right existed in *The Darlington:* "[O]ne has to look long and hard to find even a semblance of a contractual right rising to the dignity of the one involved in *Lynch* . . . . " *Id.* at 91.

In *The Darlington*, the Court relied on the fact that the law prevailing at the time the contract was entered into did not give the private party the right it sought to enforce, and that the private party's contract with the government was *silent* with respect to the existence of that right. *Id.* at 87-90. Thus, the Court's refusal to infer

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444 U.S. 164, 179 (1979) ("[T]he consent of individual officials representing the United States . . . can lead to the fruition of a number of expectancies embodied in the concept of 'property' – expectancies that, if sufficiently important, the government must condemn and pay for before it takes over the management of the land owner's property.").

that the private party had somehow obtained a vested property right is hardly surprising. What is surprising is petitioners' attempt to wring from the Court's holding the principle that an express promise in a valid contract can be repudiated with impunity. Far from supporting petitioners' case, *The Darlington* supports respondents' by framing the issue precisely: where there are no contract rights, Congress is free to legislate; but where contract rights have vested, Congress cannot impair those vested contract rights with impunity.[10]

Petitioners make the same error in their reading of *POSSE*. According to petitioners, *POSSE* "held that when Congress eliminated the States' contractual right . . . the contractual right lost did not 'rise to the level of "property" ' under the Fifth Amendment." Pet. Br. at 42 n.41 (quoting *POSSE*, 477 U.S. at 55). To the contrary, *POSSE* turned on the fact that there was no contract right to be protected because the government's promise was gratuitous. The Court noted, in distinguishing *Lynch* and *Perry*, that California had not bargained for the "right" it claimed to withdraw from the social security system, nor was that "right" supported by any "independent consideration," since the federal government could have forced the state to participate in the system at any time. *POSSE*, 477 U.S. at 55. Thus *POSSE*, like *The Darlington*, is not a vested rights case at all, and petitioners misconstrue the holding in those cases by arguing that they impart to

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[10] When placed in its proper context, therefore, *The Darlington* Court's admonition to "[t]hose who do business in the regulated field," 358 U.S. at 91, actually supports respondents' rights here. It is precisely because the regulatory regime may change that entities like respondents are not content to rely on regulatory pronouncements, but instead seek to negotiate binding contracts with the government.

Congress the power to abrogate existing, vested contract rights.[11]

II. NO PRINCIPLE OF LAW EXCUSES THE GOVERNMENT'S REPUDIATION OF ITS CONTRACTUAL COMMITMENTS

A. The Law Creates No Higher Standard For Contracts With The Government To Be Binding.

Petitioners further argue that respondents do not have enforceable contract rights because their contracts do not state in "unmistakable terms" that the federal regulators promised that Congress would never change the statute in such a way as to affect their right to rent adjustments. Pet. Br. at 32.[12] Petitioners have, by their

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[11] Similarly, petitioners quote this Court's decision in the *Sinking Fund Cases* in support of their assertion that Congress has the power to modify the government's contracts. Pet. Br. at 33 n.31. Yet in the sentences immediately following the sentence quoted by them, the Court sharply limited that power to "operation in the future." *Sinking Fund Cases*, 99 U.S. at 721. The Court held that a law altering or vacating contracts already entered into would be unconstitutional. *Id.* Although the Court went on to sustain the law at issue, it did so because nothing was taken "from the Corporation or the stockholders that actually belong[ed] to them." *Id.* at 726. In other words, the law, unlike here, did not actually alter or abrogate existing contract rights; it merely imposed new guidelines, where previously there had been none, for future conduct.

[12] In connection with their statutory arguments, petitioners suggest that the principles of deference stated by this Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) apply to their reading of the statute at issue here, and, therefore, to their reading of the relevant contract terms. Pet. Br. at 21, 26. *Amici* disagree. *Chevron* deference is inappropriate with respect to interpretations of agency contracts or statutes affecting agency contracts, since "deference might lead

passing reference to this "unmistakability doctrine," transformed a rather commonsensical notion into a formalistic doctrine that would render unenforceable nearly every contract between the government and private citizens. In fact, this Court has long held that Congress "unmistakably" waives its power to alter a statute retroactively when it makes an express affirmative promise; only when it makes *no* promise, is there no "unmistakable" waiver.

To be sure, the government's contractual commitments cannot override its responsibility to protect public health or safety.[13] Yet this recognition of the government's essential responsibilities has never been understood to erase from the law books the fundamental proposition that "the right to make binding obligations is a competence attaching to sovereignty." *Perry*, 294 U.S. at 353. Indeed, as *POSSE* and the case on which *POSSE* relied, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), show, the "unmistakable waiver" principle arose in response to a claim of a contract right in the face of governmental *silence*, not an explicit commitment, as here.

Merrion involved oil and gas leases granted by the Apache Tribe that were silent on the question of the Tribe's ability to impose severance taxes. In the absence of such a contract provision, the Tribe could not be held

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a court to endorse self-serving views that an agency might offer in a post hoc reinterpretation of its contract." *National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1571 (D.C. Cir.), *cert. denied*, 484 U.S. 869 (1987). *See also Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598 (D.C. Cir. 1992).

[13] *See, e.g., United States Trust*, 431 U.S. at 25 (a state's promise to secure a revenue bond by a particular public facility cannot be construed to bind the state never to close that facility for health or safety reasons).

to have waived its taxing power as to the lessees. As the Court concluded:

> We could find a waiver of the Tribe's taxing power only if we inferred it from *silence* in the leases. To assume that a sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in a commercial agreement turns the concept of sovereignty on its head . . . .

455 U.S. at 148 (emphasis added).

Quoting the above passage from *Merrion*, the Court in *POSSE* reiterated that a contractual obligation of the government cannot be inferred from silence. The *POSSE* Court reaffirmed, however, that an express contractual promise cannot be abrogated by a later exercise of sovereign power, noting that "the Federal Government, as sovereign, has the power to enter contracts that confer vested rights, and [its] concomitant duty to honor those rights . . . . " 477 U.S. at 52.

It was in this context – totally inapplicable here – that *POSSE* held that the government's sovereignty had not been waived in "unmistakable terms." Indeed, this Court has repeatedly recognized the incoherence of petitioners' rule of construction, *i.e.*, that every *express promise* by the government that it "will do X" carries the *implied condition* "unless the government changes it mind," which can be negated only by another express promise by the government that it "will not stop doing X." In rejecting precisely such an argument, the Court long ago observed, "[H]ow an express contract can contain an implication, or consist with a reservation directly contrary to the words of the instrument, has never yet been discovered." *Murray v. Charleston*, 96 U.S. 432, 444 (1878). In rejecting the notion that an explicit contractual promise can be abrogated by some inherent reservation of authority, the Court, quoting Alexander Hamilton, observed that a government contract so understood

> would "[i]nvolve two contradictory things: an obligation to do, and a right not to do – an obligation to pay a certain sum, and a right to retain it in the shape of a tax. It is against the rules, both of law and of reason, to admit by implication the construction of a contract or principle which goes in destruction of it."

Id. at 445. The Court in *Perry* rejected this argument in similarly unequivocal terms, again quoting Hamilton:

> [W]hen a government enters into a contract with an individual, it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of the legislator for that of a moral agent, with the same rights and obligations as an individual . . . . It is in theory impossible to reconcile the idea of a promise which obliges, with a power to make a law which can vary the effect of it.

294 U.S. at 351 n.3.[14]

Thus, the Court should read petitioners' "unmistakability" argument for what it is: a thinly-veiled attempt to assert a right to avoid their express promises on the basis of a formalistic doctrine that has nothing to do with the parties' intent. Viewed in this light, the argument must, like petitioners' other conceptions regarding the "modern view of congressional authority," be rejected.

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[14] *See also* Story, *Commentaries* § 1385 ("[I]t may be laid down as a general principle, that, whenever a law is in its own nature a contract, and absolute rights have vested under it, a repeal of that law cannot divest those rights, or annihilate or impair the title so acquired. A grant . . . amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert it.").

B. The Circumstances Underlying The Government's Breach Do Not Excuse It From Liability.

1. Petitioners continue their effort to avoid the plain meaning of *Lynch, Perry*, and their progeny by attempting to limit their scope to cases where the government abrogated "vested rights . . . solely to save the government money . . . . " Pet. Br. at 42. The express language and reasoning of the cases, however, preclude such a cramped reading.

Amici will not comment on petitioners' strained factual argument that Congress abrogated respondents' contracts for reasons other than to save money. Even assuming the accuracy of this assertion, petitioners' legal argument is unsustainable. This Court's precedents have not treated government promises to pay money differently from other promises concerning regulatory or other sovereign powers.[15] Nor has this Court ever suggested that the government is free to repudiate its contractual promises so long as it has a rational justification other than its own naked desire to keep the money owed. For example, important aspects of legislation such as improving "[m]ass transportation, energy conservation, and environmental protection" during a national energy crisis (*United States Trust*, 431 U.S. at 28), exercising "Congress' paramount power to 'raise and support armies'" when the country was shifting to an all-volunteer military (*Larionoff*, 533 F.2d at 1191), putting into place a comprehensive national program to shift from the gold standard

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[15] *See, e.g., Hodel*, 481 U.S. at 706-08 (promise to allow Indians to pass on their interest in fractionated land); *Monsanto*, 467 U.S. at 992-93 (promise to maintain confidentiality of trade secrets submitted to EPA in registration of pesticides); *United States Trust*, 431 U.S. at 3 (promise not to spend all money for mass transportation); *Santobello v. New York*, 404 U.S. 257, 257-58 (1971) (promise of a specific sentence recommendation upon a guilty plea); *Sinking Fund Cases*, 99 U.S. at 719 (promise concerning payment schedule of money owed *to* the government).

in order to stabilize banking and currency during a time of worldwide financial crisis (*Perry*, 294 U.S. at 350-51), resolving the "serious public problem" of "extreme fractionation of Indian lands" (*Hodel*, 481 U.S. at 718), avoiding burdens and delays in a regulatory program from which the government did not profit (*Monsanto*, 467 U.S. at 993), or achieving essential government economies during the Great Depression (*Lynch*, 292 U.S. 571), have not excused the government from liability for repudiation of its contracts.

That the Court has never drawn the distinction petitioners urge here is hardly surprising: from a Constitutional or public policy perspective, the government's failure to pay *money* promised in exchange for valuable consideration is no different from reneging on any other promise. Promises not exclusively related to the payment of money can be as financially valuable to a contractor as promises for money, and repudiating such promises can save the government as much money as repudiating monetary debts. Moreover, enforcing the government's monetary obligations limits its flexibility no less than does enforcing its nonmonetary obligations. And Congress will always be able to invoke a legitimate purpose – in addition to the naked desire to save money – to justify its repudiation. Indeed, since the government must always have a legitimate government purpose for any legislation to survive substantive due process review, requiring it to articulate such a purpose in order to freely abrogate its contractual liabilities is no limitation at all.

2. Petitioners also make a suggestion, related to their argument that they are liable only for contract breaches designed solely to save money, that is remarkable for its potential scope. In distinguishing *Lynch*, petitioners note that that case did not involve "supervening conditions" and suggest that the presence of such conditions renders any congressional abrogation of the United States' contracts constitutionally valid. Pet. Br. at 43. In a

footnote, petitioners suggest that "ordinary uses of the commerce power" represent examples of such supervening conditions. *Id.* at n.42. Thus, in the guise of describing an *exception* to the constitutional limitation on the government's ability to abrogate its contracts, petitioners actually offer a rule that completely eviscerates any such limitation on governmental power. Petitioners are, quite simply and quite frankly, arguing that whenever Congress has power under the Commerce Clause to enact certain legislation, the exercise of that power cannot be challenged under the Due Process Clause, notwithstanding its effects on the contractual obligations of the United States. Such a principle makes the Fifth Amendment a dead letter, renders the government's contractual promises meaningless, and is completely unsupported by authority.[16] Moreover, the cases cited by petitioners either do not involve contracts at all or involve only private contracts. They can hardly, therefore, set the standard for

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[16] Indeed, the very cases cited by petitioners recognize that Congress' power under the Commerce Clause, though extensive, is limited by other provisions of the Constitution. *See, e.g., Hipolite Egg Co. v. United States,* 220 U.S. 45, 57 (1911) (Commerce power "is complete in itself, subject to no limitations except those found in the Constitution."); *Lottery Case,* 188 U.S. 321, 362-63 (1903) (Commerce power "is subject to such limitations or restrictions as are prescribed by the Constitution. This power, therefore, may not be exercised so as to infringe rights secured or protected by that instrument."). *See also Hamilton v. Kentucky Distilleries & Warehouse Co.,* 251 U.S. 146, 156 (1919) ("The war power of the United States, like its other powers and like the police power of the states, is subject to applicable constitutional limitations."); *Monongahela Navigation Co. v. United States,* 148 U.S. 312, 336 (1893) ("[L]ike the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment . . . . ").

judging the constitutional validity of breaches of the government's *contractual* obligations, unless contracts with the government are, quite literally, not worth the paper they are written on.

Rather, the "paramount power" claimed by the government extends no farther than simply to excuse the government's performance (though not *liability, see infra* at 27-28) when unforeseen conditions not addressed in the contract at the time of its making have rendered performance impossible or a threat to the public's health or safety. *See United States Trust,* 431 U.S. at 25.[17]

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[17] *United States Trust* interpreted the requirements of the Contract Clause, which does not apply to the federal government. Petitioners suggest that the Contract Clause imposes more exacting requirements upon the states than the Fifth Amendment imposes on the federal government. Pet. Br. at 36 n.35. This is not so. While it is true that the Court has indicated as much concerning the impairment of *private* contracts, it has never hinted that the Due Process Clause or Taking Clause gives the federal government greater leeway to repudiate its own contracts than does the Contract Clause for the states. If anything, the Court's precedent indicates that the federal government is held to a higher standard under the Fifth Amendment than are the states under the Contract Clause. *See Perry,* 294 U.S. at 352-54; *United States Trust,* 431 U.S. at 23-26. This rule makes sense because the text and history of the Contract Clause clearly show that it acts as a restriction on the states' ability to interfere with *private* contracts, but it is far less clear that the Due Process Clause has any such effect in the private world. *See Allied Structural Steel v. Spannaus,* 438 U.S. 234 (1978); *Lincoln Federal Labor Union v. Northwestern Iron and Metal Co.,* 335 U.S. 525, 536 (1949). Conversely, however, it is quite clear that the Due Process Clause provides substantial restrictions on the actions of the *federal* government, while it is far less clear that the Contract Clause was intended to apply to contracts made by *state* governments. *See, e.g., United States Trust,* 431 U.S. at 45 (Brennan, J., dissenting); G. Gunther, *Constitutional Law,* 604 (1974); B. Wright, *The Contract Clause Of The Constitution,* 15-16 (1938).

In *United States Trust*, as noted earlier, the government's decision to violate a security covenant in a bond by spending toll revenues on mass transit served the substantial purpose of reducing automobile use during a nationwide energy crisis. *Id.* at 28. The Court nonetheless rejected the state's claim that the existence of such goals justified abrogating a particular contract, explicitly declining "this invitation to engage in a utilitarian comparison of public benefit and private loss." *Id.* at 29.

Rather, the Court required the state to demonstrate that abrogating the particular bond covenant was "necessary to achievement of the plan." *Id.* at 29. It ruled that the state failed to meet this least restrictive alternative standard because, "without modifying the covenant at all, the States could have adopted alternative means of achieving their twin goals of discouraging automobile use and improving mass transit." *Id.* at 30.

The Court also held that abrogation of the covenant failed to satisfy the additional requirement that the harm that the state sought to eliminate was not foreseeable when the contract was entered. Although an unforeseen national energy crisis had subsequently intervened, the Court noted that concerns about energy were "not unknown" at the time of the contract, and subsequent exacerbation of those concerns "were of degree and not of kind." *Id.* at 32.

The quote from *Lynch* on which petitioners rely illustrates precisely this point. Pet. Br. at 43. What the Court actually said in *Lynch* was that the United States had made no showing of "*supervening conditions* which *authorized* Congress to abrogate *these* contracts in the exercise of its police or any other power." *Lynch*, 292 U.S. at 580

Thus, while the Fifth Amendment may be less restrictive on the federal government than is the Contract Clause on the states with respect to the private sector, the Due Process Clause imposes a more onerous standard on the federal government with respect to its own contracts.

(emphasis added). Thus *Lynch*, like *United States Trust*, simply hypothesizes a situation in which unforeseeable "supervening conditions" arising after the formation of the contract converted the contract into a public safety threat which the government had a paramount purpose in eliminating. As the Court noted, in the Great Depression, "economy had become urgent because of lessened revenues and the heavy obligations to be issued in the hope of relieving widespread distress." *Lynch*, 292 U.S. at 580. While this explanation was sufficient to justify Congress' imposition of a burden on those without binding contracts with the government, it was wholly insufficient with respect to those who had such commitments.[18]

Application of this principle in *Perry* is clearer still. Concluding that the challenged statute, which provided that debts and obligations could be discharged through payment of legal tender rather than through payment in gold, significantly advanced Congress' paramount power of regulating the value of money and commerce, the Court held in *Perry's* companion case that this power justified invalidating gold clauses in private contracts. *See Norman v. Baltimore & O.R. Co.*, 294 U.S. 240 (1935). *Perry* nevertheless held that the paramount power to regulate the gold supply did not empower Congress to abrogate gold clauses in its own contracts. The "right to make binding obligations is a competence attaching to sovereignty," and, having used this power to create obligations, Congress could not invoke the same "authority to alter or destroy those obligations." *Perry*, 294 U.S. at 353-55.

Viewed in this light, while the feeble public purposes advanced by petitioners may explain their actions here,

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[18] *See also Larionoff*, 533 F.2d at 1191 (Legitimate paramount power "to raise and support armies' and to make rules for the government and regulation of the land and naval forces" was not sufficient to justify "a change in the terms of already binding extension agreements.").

they cannot excuse those actions. Whatever perceived purpose or power that may justify petitioners' breach here, it pales when compared to reducing expenditures and stabilizing financial markets during the Depression, reducing automobile use during an energy crisis, and exercising plenary authority over military personnel.

3. It is important to note that respondents' participation in the Section 8 program, unlike the States' actions in *POSSE*, could not have been accomplished absent respondents' voluntary assent to the contractual arrangements. In other words, under no reasonable understanding of the spending or commerce powers could Congress have singled out respondents and forced them to participate in the program.[19] That being so, preventing petitioners from breaching their commitment hardly *circumscribes* any sovereign power. Instead, permitting petitioners unilaterally to abrogate their contracts without liability not only would deprive respondents of the benefit of their bargains, it would also enable petitioners to accomplish through broken promises that which they could not have required through straightforward legislation. Petitioners simply cannot assert any legitimate, let alone important, interest in so *expanding* their constitutional authority through deceptive measures.[20]

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[19] *See, e.g., Grove City College v. Bell*, 465 U.S. 555, 575 (1984) ("Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept."); *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981).

[20] This point is made clear by the Court's decision in *Pennhurst, supra*. In holding that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously," the Court reasoned:

C. Whatever The Government's Ability To Avoid Having To Specifically Perform Its Contractual Commitments, It May Not Breach Such Commitments Without Incurring Liability.

Finally, *amici* wish to stress that no matter what conclusions the Court might reach with respect to the ability of respondents to prohibit petitioners from acting in violation of their contractual obligations, they may *not* avoid monetary liability for the consequences of any such breach. It is one matter to determine, under substantive due process principles, whether the right of a private individual to compel the government to *perform* its contractual undertakings outweighs the public interest in allowing Congress flexibility to reverse course and address newly-perceived public problems. This due process analysis does not dictate whether, under contract and Taking Clause principles, the right of a private individual to compensation for financial harm caused by the government's repudiation of a contractual commitment outweighs the government's naked desire to shift the financial burden of general regulatory policies from itself to private individuals who took the government at its word. Shifting the cost of public programs to private

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> Unlike legislation enacted under [section] 5 [of the Fourteenth Amendment], however, legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract" . . . . Though Congress' power to legislate under the spending power is broad, it does not include surprising participating States with post acceptance or "retroactive" conditions.

451 U.S. at 17, 25.

hands, unlike maintaining legislative flexibility, is not a legitimate public interest. To the contrary, it is irreconcilable with the fundamental tenets of contract law and the core principle underlying the Taking Clause.[21]

In short, the question of what remedies are available for a government breach of contract is distinct from the question of whether a private citizen had a contract with the government in the first place. Whatever relevance petitioners' discussion of the ability to foreclose "Congress's right to enact legislation," Pet. Br. at 32, might have with respect to the former question, it is not implicated by the latter question.

Well-established judicial precedent supports this distinction, as it has been squarely held that contractors are entitled to damages for the financial harm of a government breach. Indeed, even when the government's contractual promises of performance cannot be enforced – for example, because they were illegal or unauthorized at their formation – the benefits conferred and costs incurred by a private party in reliance on those promises must be reimbursed, either by application of a *quantum*

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[21] *See First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 319 (1987), quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (purpose of Taking Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."). *See also Winstar Corp.*, 25 Cl. Ct. at 549:

> [T]he government's power to regulate must operate within the context of plaintiffs' contract rights. While Congress clearly may alter the regulatory treatment . . . , it must also honor the plaintiffs' rights. The government may breach the contract, but it must pay for the damages the plaintiffs suffer. Any alteration of this principle would undercut our democratic system. It would allow governmental policies to be paid for with a minority's rights.

meruit or *quantum valebant* analysis, or through a broader effort to put the parties "substantially in the position they would have occupied without the attempted contract." *New York Mail & Newspaper Transp. Co. v. United States*, 154 F. Supp. 271, 276 (Ct. Cl.), *cert. denied*, 355 U.S. 904 (1957). *See Clark v. United States*, 95 U.S. 539, 542 (1877) ("[w]here a parol contract has been wholly or partially executed on one side, the party performing . . . will be entitled to recover such value as upon an implied contract for a quantum meruit.").[22] Thus, it is well-settled that the government cannot retain the benefits of a contract that has been performed by the private contractor, and at the same time repudiate without liability its own obligations. Indeed, this Court has made clear that even with respect to private contracts, the mere fact that a subsequently enacted federal statute precludes "specific performance" of the contracts "by no means [establishes] that [a promisor] could refuse to make just compensation in money for the unpaid balance" of the plaintiff's performance under the contract. *New York Central & Hudson River R.R. v. Gray*, 239 U.S. 583, 586-87 (1916).[23]

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[22] *See also Prestex, Inc. v. United States*, 320 F.2d 367, 373 (Ct. Cl. 1963) ("Even though a contract be unenforceable against the Government, . . . the Government [must] pay for goods delivered or services rendered and accepted under it."); *Ocean Technology, Inc. v. United States*, 19 Cl. Ct. 288, 293 (1990); *United States v. Amdahl Corp.*, 786 F.2d 387, 393 (Fed. Cir. 1986) (government must return value of benefits received, on *quantum valebant* or *quantum meruit* basis, under contract that was properly terminated by the government for illegality); *Yosemite Park & Curry Co. v. United States*, 582 F.2d 552, 560 (Ct. Cl. 1978).

[23] *See also* Story, *Commentaries*, § 1379 (recognizing "distinction between the obligation of a contract, and a remedy upon it . . . ").

It is unclear to *amici* whether these analytical distinctions between an action to enforce a contract and an action for money damages based upon its breach or some other like theory compel a different result in the case at bar, where respondents are simply trying to obtain payment of money due them under their leases. It may well be, however, that in other cases this distinction may make a very real difference, and the Court should therefore keep this distinction in mind when considering the issues presented in this case.

CONCLUSION

For the foregoing reasons, should the Court reach the constitutional issues presented in this case, it should affirm the decision of the Court of Appeals of the Ninth Circuit and hold that petitioners' actions unconstitutionally abrogate respondents' contracts.

Dated: February 8, 1993 Respectfully submitted,

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